No. 2789.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTH AMERICAN OIL CONSOLIDATED, a Corporation, WALTER P. FRICK, JOHN F. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEIMERT, and WICKHAM HAVENS,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF

ADDRESSED TO THE POINT THAT APPELLANTS ARE ENTITLED TO A PATENT UNDER THE ACT OF MARCH 2, 1911

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

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APPELLANTS ARE ENTITLED TO A PATENT UNDER THE ACT OF MARCH 2, 1911, REGARDLESS OF ALL QUESTIONS AS TO THEIR DILIGENCE OR THAT OF THEIR PREDECESSORS.

The proposition which this Supplemental Brief is intended to present, may be stated in syllabus as follows:

1. In cases where the holder of a *bona fide* claim has actually discovered oil within a withdrawn area, the Act of Congress passed March 2, 1911, entitles such holder to a patent, *"provided that at the time of inception of development under the claim,"* the land was not withdrawn from mineral entry.

2. In the class of cases to which said Act applies, it dispenses with the requirements of the Pickett Act which call for "diligent prosecution of work leading to discovery."

3. The Pickett Act defines the terms upon which, prior to discovery, a claimant is permitted to continue his efforts to discover oil or gas within a withdrawn area. The Act of March 2, 1911, on the other hand, defines a claimant's rights after he has in good faith gone ahead and actually made a discovery. Under the latter Act it is too late for the government to raise any question as to a claimant's diligence where it appears that such claimant initiated development on the claim prior to the order of withdrawal, and thereafter went ahead and accomplished an actual discovery.

THE SAID ACT OF MARCH 2, 1911, SHOULD BE READ IN CONNECTION WITH ITS TITLE.

The title of an Act of Congress is ordinarily no part of the Act itself. But it is well settled that if the words of such Act are doubtful or ambiguous, the title may be looked to for the purpose of resolving such doubt or ambiguity.

> "The title is no part of an act and cannot enlarge or confer powers, or control the words of the act *unless they are doubtful or ambiguous.*"

U. S. v. *Oregon, etc. R. R.*, 164 U. S., 526, 541.

See also:

U. S. v. *Fisher*, 2 Cranch, 385, 386;
In re Boston M. & M. Co., 51 Cal., 624, 625.

The ambiguities in the text of the Act of March 2, 1911, are such that until the title of the Act is looked to, it is not easy to grasp its full meaning.

However, the intent of Congress becomes entirely clear when the Act is considered in connection with its title.

The said Act, with appropriate references to its title inserted by us in parentheses, reads as follows:

> *"An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.*
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case (*where the locators are bona fide and they or their successors shall have effected an actual discovery of oil or gas*) shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim (*of such bona fide locators or their successors who shall have effected an actual discovery of oil or gas*) is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases; **provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry."**
>
> 36 St. L., 1015.

An analysis of the foregoing Act will satisfy the Court that its correct meaning is this:

If public land was open to location; and

If a *bona fide* locator had duly made a paper location thereon prior to the passage of the Act; and

If such locator or his successor in interest initiated development under such paper location; and

If at the time of the inception of such development

the land had not been withdrawn from mineral entry; and

If the locator or his successor in interest has gone ahead and made an actual discovery of oil or gas;

Then, when patent is applied for, the fact that an assignment or transfer of the claim or of some interest therein may have been made prior to the discovery of oil or gas, will not justify the Land Department in refusing a patent if the claim is in all other respects valid and regular; nor shall such patent be refused because of the fact that an order of withdrawal may have been made after the inception of development and prior to such discovery. But patent shall issue in these cases as in other cases, with the usual restrictions as to the maximum acreage in any one claim.

THE PURPOSE OF THE ACT WAS TWOFOLD.

In two ways this Act of March 2, 1911, was intended to "protect the locators in good faith of oil and gas land who shall have effected an actual discovery."

First: It validates all transfers which had been made prior to discovery—thus granting relief against the so-called Yard decision of the Land Department which had held such transfers void; and

Second: It allows patents to all *bona fide* locators who had initiated development on their claims prior

to a withdrawal and who had gone ahead thereafter and effected an actual discovery.

The so-called Yard decision (38 L. D., 59) had then recently been extended by the Land Department to oil claims. (*Bakersfield Fuel & Oil Co.*, 39 L. D., 460, Jan. 19, 1911.) In said decision the Land Department held that prior to discovery of oil or gas a locator had no right which he could assign or transfer. Nearly every oil well in the country had been drilled to discovery either by lesses or grantees of the original locators or some of them. The Yard decision invalidated all such transfers, and the situation called for legislation which would render such transfers valid.

But there was also another situation which called quite as loudly for relief. The Pickett Act left the titles to oil claims within the withdrawn areas in a deplorable situation. If the occupant or claimant was at the date of a withdrawal order "in diligent prosecution of work leading to discovery of oil or gas," the Act declared that his "rights" should not be "affected or impaired" by such order, "so long as he shall continue in diligent prosecution of said work."

But what, under the Pickett Act, would amount to a "diligent prosecution of work leading to discovery of oil or gas"? And what would constitute the continuance of diligence such as the Act called for? These were open questions.

The answer to these questions rested wholly in parol. The claimant had no definite criterion to go by. He must decide for himself whether or not his own diligence at the date of the order justified his further expenditures in the search for oil. Intending purchasers of the claim prior to discovery must likewise pass upon the question of the occupant's diligence for themselves. And even when discovery was made, that did not settle the matter; for under the Pickett Act the owner might still be denied a patent for alleged lack of original or continued diligence. A purchaser of a highly developed producing property, however firmly convinced that there had been proper diligence both at and after the date of the withdrawal order, was still in a situation to have his title taken from him and patent refused because the degree of diligence employed at and after a withdrawal order might not conform to the ideas of someone in the Land Office.

When once the occupant of a claim upon which development had been initiated in good faith prior to a withdrawal order, had gone ahead in good faith —without any interference whatever from the government—and had effected an actual discovery, it was eminently just and proper that the degree of the occupants' diligence at the date of the order of withdrawal or of his continued diligence during a particular period thereafter should be no longer open to inquiry.

The Act was intended to meet this situation quite as much as it was intended to correct the hardships produced by the Yard decision.

THE HISTORY OF THE ACT SHOWS THIS TO BE THE CONSTRUCTION INTENDED BY CONGRESS.

Not only the title of the Act but the history of the Act as well, emphasizes the fact that Congress intended that the inception of development prior to a withdrawal, when followed by actual discovery, should be the test of the claimant's right to a patent.

As originally passed by the House the proviso in the bill was much broader than in its final form. It then read as follows:

> "Provided, however, That such lands were not at the time of *entry into possession thereof* covered by any withdrawal."

C. R. (House) Vol. 46, part 2, p. 1965;
C. R. (House) Vol. 46, part 3, p. 2097.

The bill reached the Senate on February 8, 1911, and was referred to the Committee on Public Lands (Cong. Rec., Senate, Vol. 46, pt. 3, p. 21). In said Committee the bill was amended after an interchange of views with the Secretary of the Interior. The communications from the Secretary of the Interior accompany the report of said Committee (See Report No. 1179, Cong. Rec., Senate, Vol. 46, part 3, p. 2641).

It appears from said record that in the Senate Com-

mittee on Public Lands, it was first proposed to amend the proviso in the Bill as it passed the House so that the same should read as follows:

> "Provided, however, That such lands were not at the time of *the inception of such claim and of development thereon or thereunder* withdrawn from mineral entry."

This intended amendment was communicated to the Secretary of the Interior for an expression of the views of his Department. Under date of February 9, 1911, he replied as follows (italics ours):

> "The proviso, 'provided, however, That such lands were not *at the time of the inception of such claim and of development thereon or thereunder* withdrawn from mineral entry,' is believed to have all the force intended to be given to the proviso in the bill as passed by the House.'
>
> . . . . . .
>
> **"The suggested wording of the proviso also recognizes the inception both of the claim and of the development thereunder as essential elements in the inauguration of an equity by the oil land locator, and, it is believed, fully insures the bona fides of the claimant seeking relief under this legislation.**
>
> "The bill in this form has the approval of the department, and I repeat my expressions of conviction contained in my letter of January 16, addressed to your Committee, that *the remedial measure is both needed and deserved*, with the recommendation that the bill be enacted into law.
>
> "Very respectfully,
>
> "R. A. BALLINGER,
>
> "Secretary."

After the receipt of the foregoing letter a suggestion was evidently made in the Committee that the

proviso be further amended to read in its present form, viz:

> "Provided, however, That such lands were not *at the time of the inception of development* on or under such claim, withdrawn from mineral entry."

This proposed change was communicated to the Secretary of the Interior by Senator Flint. This was answered by the following letter from Secretary Ballinger to Senator Flint:

> "THE SECRETARY OF THE INTERIOR.
> "Washington, February 14, 1911.
>
> "My dear Senator:
>
> "Replying to your letter of February 14, 1911, submitting a proposed amendment to the proviso to H. R. 32344, as follows:
>
> "'Provided, however, That such lands were not at the time of the inception of development on or under such claim, withdrawn from mineral entry.'
>
> "I have the honor to advise you that in my opinion the proposed amended proviso will effect the same end contemplated by the original proviso, and I have no objection to offer to the suggested change, **which emphasizes the fact that there must have been development initiated upon the claims prior to the withdrawal in order that they shall have the benefit of the provisions of the Act.**
>
> "Very respectfully,
> "R. A. BALLINGER,
> "Secretary.
>
> "Hon. Frank P. Flint,
> "United States Senate."

The language of the foregoing letter indicates unmistakably the understanding not only of the Secretary of the Interior as to the scope of the Act, but it also shows that Congress had the same understanding when it passed the Act; for the *proviso* in the form

thus approved and interpreted by Secretary Ballinger was adopted by the Senate upon the report of the Committee on Public Lands *which set forth the said letter of Secretary Ballinger* (Cong. Rec., Senate, Vol. 46, part 3, p. 2641; also Vol. 46, part 4, p. 3410). On February 27, 1911, the House concurred in the Senate amendment (Cong. Rec., House, Vol. 46, part 4, p. 3618).

THE PARTICULARS IN WHICH THE ACT OF MARCH 2, 1911, ENLARGED THE PICKETT ACT.

The said Act of March 2, 1911, should be read in connection with the Pickett Act of June 25, 1909. The Pickett Act—it will be noted—merely preserves the "rights" of a *bona fide* locator or claimant who was engaged in diligent prosecution of work leading to discovery at the date of any withdrawal order. It further declares that such "rights" shall not be "impaired" or "affected" by such withdrawal order so long as the occupant or claimant shall continue in such diligent prosecution of work.

Thus the Pickett Act is essentially an Act which permits the occupant or claimant who was duly diligent at the date of withdrawal to remain in possession and make a discovery if he can. And though unsuccessful in his first efforts, nevertheless if he is diligent, he may continue to go ahead for years and years in his quest until he makes a discovery or voluntarily abandons his efforts.

What happens when he makes a discovery, the Pickett Act does not expressly state; but since the Act declares that the "rights" of the diligent *bona fide* occupant or claimant shall not be "affected or impaired," it is clear, we take it, that after discovering oil, he may take the oil, work his claim, sink more wells, and apply for a patent at his pleasure, just as if no order of withdrawal had ever been made. His "rights" in this regard are not "affected or impaired" by the order of withdrawal, as we understand the Pickett Act.

But the difficulty with the Pickett Act is that in such a case a claimant is compelled at his peril to pass upon the question of due diligence. He must reach his own conclusion as to whether or not the facts bring his case within the protection of the Pickett Act. His troubles are not over when in good faith and after investigation he has reached the conclusion that he (or his predecessors, as the case may be) was using the degree of diligence called for by said Pickett Act at the date of a withdrawal order. After reaching that conclusion he goes ahead and uses what he believes to be the continued diligence called for by the said Act, and he spends perhaps hundreds of thousands of dollars in the belief that his claim is good; but when he applies for a patent, the Land Department meets him with two objections, viz:

1. That he has erred in concluding that due dili-

gence was being employed on the claim at the date of the withdrawal order; and

2. That he was likewise in error in believing that the diligence employed in the development work on the property after the order of withdrawal was sufficiently continuous to meet the demands of the Pickett Act.

Each case must stand on its own bottom on the question of diligence and the Land Department is as likely to be in error as the claimant in applying the law to the facts. But on either of the two grounds above noted, if the Pickett Act were the sole measure of the claimant's rights, a patent might be refused regardless of the claimant's absolute good faith and of his heavy outlays, and regardless, also, of the fact that he has actually proceeded without interference from the government until he has made a discovery of oil or gas.

The case at bar affords a good example of what such a situation leads to; for not only was a discovery actually made in due course upon every claim, but it appears that three-quarters of a million dollars was expended in absolute good faith in developing the property.

And yet under the Pickett Act, the whole case hinges upon what under the circumstances must be characterized as an absurd technical question, viz: Whether a claimant can be said to have been in

diligent pursuit of work leading to a discovery at a given date when much against his will his drilling operations were delayed for a few months, owing solely to the physical impossibility of getting a water supply sooner. Here there is no question but that there was a *bona fide* inception of development prior to the withdrawal order. No question of good faith is involved. No moral issue is presented. And yet upon the answer to a technical question—a question to which one mind may answer "yes" and another "no,"—the reward which morally should attend the toil and the risks and the enormous outlays of Appellants, are made to swing in the balance.

Such a situation naturally called for remedial legislation. This relief the Act of March 2, 1911, was intended to afford. Under this remedial Act the locators must be *bona fide* locators—not "dummies." The inception of development must have antedated the order of withdrawal. But there need not have been—as under the Pickett Act—a diligent pursuit of work leading to a discovery of oil or gas at the very date of the withdrawal order; nor is there any requirement, as in the Pickett Act, that the diligent prosecution of work leading to discovery must be continuous down to the moment of discovery. This later Act declares in effect, that where there has been an actual discovery of oil or gas no technical questions regarding the sufficiency of the work performed to

constitute due diligence at or after the passage of the Pickett Act, are of any consequence; but that when once a discovery has been made, then if it be also shown *that the development of the claim was initiated prior to the withdrawal order,* the claimant's right to patent (if his claim is regular and valid in other particulars) is complete.

APPLICATION OF THE ACT OF MARCH 2, 1911, TO THE CASE AT BAR.

In the case at bar the "inception of development" on each claim preceded the order of withdrawal of September 27, 1909, by several months; for as early as June, 1909, standard derricks with rig irons complete, together with dwelling houses for the drilling crews, were erected on the property. After this a delay of several months followed, owing solely to the fact that the claimants were unable to get water. A discovery was made on each of the four claims after said withdrawal order was made, but long before this suit was brought. The case therefore falls directly within the protection of said Act of March 2, 1911, and since the regularity of appellant's claims is not otherwise questioned, appellants have under said Act a vested right to a patent regardless of any questions as to their own diligence or that of their predecessors

intermediate the inception of development and the date of discovery.

Respectfully submitted.

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